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No. 113

In the Supreme Court of the United States

OCTOBER TERM, 1960

WILLIAM H. NICHOLS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
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OPINION BELOW

The opinion of the court of appeals (Pet. App. 7–9) is reported at 276 F.2d 147.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 1960 (Pet. App. 9). On May 2, 1960, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including June 3, 1960. The petition was filed on May 31, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether there was sufficient evidence identifying petitioner as the driver of an automobile containing untaxed liquor so as to sustain his conviction for unlawful possession of such liquor.

STATEMENT

Petitioner was charged in a one-count indictment in the United States District Court for the Middle District of Tennessee with the unlawful possession of 15 gallons of untaxed whiskey, in violation of 26 U.S.C. 5008(b) (R. 1). The jury found him guilty and the court sentenced him to imprisonment for one year and one day and a $250 fine, the period of imprisonment later being reduced to eight months (R. 3–6). On appeal (R. 8–9), the conviction was affirmed (Pet. App. 7–9).

Pertinent evidence adduced at the trial may be summarized as follows:

On March 20, 1957 at about 8:00 p.m., Nashville police officer Coggins, proceeding south on Meridian Street, saw a Buick car going north run through a stop light and make a right turn (R. 11–12). When the police car, which had its headlights on, was about 35 feet from the Buick, Coggins saw the driver as he made the turn. At the trial Coggins identified petitioner as the driver (R. 16–18, 12–13). Coggins pursued the Buick, but the driver abandoned it and some shooting occurred. Coggins arrested one Haynie near the car (R. 13, 20). Coggins told another police officer who arrived at the scene that Haynie had told him that petitioner was the driver of the car (R. 21). Five one-gallon jugs and ten broken jugs containing untaxed whiskey were found in the trunk of the Buick. Petitioner gave himself up at police headquarters two nights later (R. 14). No federal officers participated in the investigation (Pet. 9).

Haynie testified on direct examination that petitioner was the driver of the Buick (Tr. 54–60).[1] On cross-examination, Haynie stated that although he had been whipped by other police officers (not identified in this record) who arrived at the car after Coggins had stopped it,[2] he had told Coggins before the whipping that petitioner was the driver of the car; and that Coggins had not whipped him (R. 23–24). Haynie further testified that he was again whipped at the police station, where the officers were trying to get him to tell where petitioner kept his whiskey. Haynie replied that he did not know, since he did not work for the petitioner and had just been riding home with him (R. 24, 25).

ARGUMENT

There is no merit to petitioner's basic contention that there was not sufficient evidence that he was the driver of the car containing the untaxed liquor to sustain his conviction (Pet. 3–5).[3] Both officer Coggins and Haynie, who had been in the car with petitioner prior to his arrest, testified that petitioner was the driver. Coggins testified that, when only the short distance of 35 feet away and with his headlights on, he saw petitioner make the right turn. This testimony was based upon the witness' actual observation,

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[1] "Tr." refers to the trial transcript, which is not included in the certified record filed with this Court. We have lodged a copy of the transcript with the Clerk.

[2] Two witnesses corroborated the testimony of the whipping at the car (R. 36, 37).

[3] Petitioner does not renew his argument, rejected by the court below, that there was an unreasonable search and seizure of the liquor (see Pet. App. 8–9).

not upon the fact that Haynie later told him that petitioner was the driver. Its credibility was for the jury.

Haynie's trial testimony was that petitioner was the driver of the car. The fact that Haynie allegedly was beaten by the police after the car had been stopped did not taint that testimony, or render it inadmissible.* No federal officer participated in the beating. The beating was not administered to compel Haynie to identify the driver of the car—he had voluntarily done so to Coggins before the beating occurred—but in an attempt to ascertain where petitioner kept his whiskey. Thus, neither Haynie's designation of petitioner to Coggins as the driver, nor his trial testimony to that effect, was the product of the beating. Whether Haynie was an innocent passenger in the car or petitioner's accomplice,[5] his testimony that petitioner was the driver of the car, even if it had not been corroborated by Coggins, was sufficient to support the conviction. See *Caminetti* v. *United States*, 242 U.S. 470, 495; *Todorow* v. *United States*, 173 F. 2d 439, 444 (C.A. 9), certiorari denied, 337 U.S. 925.

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* The Department of Justice is investigating the alleged beating of Haynie by local police, to determine whether there has been any violation of 18 U.S.C. 242.

[5] The record does not establish that Haynie was an accomplice. There was no evidence that he knew the contraband liquor was in the trunk of petitioner's car, and he did not flee as the petitioner did. He testified that he did not work for the petitioner, but was just riding home with him at the time (R. 25).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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